IN THE MATTER OF AN ARBITRATION

IN THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Case No. 01-21-0000-4309

BETWEEN

TELECOM BUSINESS SOLUTION, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, LATAM TOWERS, LLC, on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED, and AMLQ HOLDINGS (CAY), LTD., on its own behalf and derivatively, on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Claimants

v.

TERRA TOWERS CORP., TBS MANAGEMENT, S.A., DT HOLDINGS INC., JORGE HERNANDEZ, ALBERTO ARZU, ALEJANDRO SAGASTUME and WILLIAM MENDEZ

Respondents

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

and

Nominal Respondent

TERRA TOWERS CORP. and TBS MANAGEMENT, S.A.,

derivatively and on behalf of CONTINENTAL TOWERS LATAM HOLDINGS LIMITED

Counterclaimants

v.

TELECOM BUSINESS SOLUTION, LLC, LATAM TOWERS, LLC, F. HOWARD MANDEL, JOHN RANIERI, RYAN LEPENE, and AMLQ HOLDINGS (CAY), LTD.,

Counterclaim Respondents

and

CONTINENTAL TOWERS LATAM HOLDINGS LIMITED,

Nominal Counterclaim Respondent

PROCEDURAL ORDER NO. 2024-13 CONCERNING RESPONDENTS' MOTION FOR LEAVE TO SUBMIT AN APPLICATION UNDER AAA COMMERCIAL RULE R-37(A)

1. In this Procedural Order we address the application received on Saturday, May 11, 2024 from the Respondents (the "Application"), made pursuant to Rule R-37(a) in the 2013 AAA Commercial Rules:[1]

> [T]o remove [Mr.] Gaitán and [Ms.] Echeverría from management of the Company and (ii) to terminate the Company's engagements with Gelber Schachter & Greenberg ("GSG") and Dechamps International Law Firm ("Dechamps") due to Mr. Schachter and Mr. Dechamps' breaches of their engagement letters with the Company by exceeding the scope of their engagement and breaching the covenants of the March 19, 2021 Framework Agreement to remain neutral, not to align with any party and to act in the best interest of the company. [2]

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[1] In what we assume is a typographical error, the Application refers to Rule "37(i)". Rule R-37(a) states: "The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods." We have also used in the quoted text from the Application the correct spelling of the name of the law firm that is co-counsel to the Company in this arbitration – Dechamps – rather than encumber the text with "sic" where "Deschamps" was used.

[2] We invited comments from Claimants on the Application, and such comments, opposing the Application, were received on May 13, 2024. Our invitation for such comments stated:

> Dear Counsel:
>
> The Tribunal acknowledges receipt of Mr. Dunning's letter today, but declines to receive the share-file of accompanying exhibits, considering this to be in excess for proper boundaries for a motion for leave application in the circumstances. Mindful that the application may be related to matters to be addressed in the Status Conference to be held with Judge Kaplan on Monday May 13, at 4:30 p.m. -- of which we were informed by Claimants in their submissions on May 7, 2024 - we direct the filing by Claimants of a written response to the motion for leave by Monday May 13 at 10 a.m. This should be of a maximum length comparable to Mr. Dunning's letter and without exhibits unless this is strictly necessary to our consideration of the motion leave as opposed to the merits of the proposed interim relief motion. <u>However</u>, if both Parties agree that (i) the matter is not so urgent as to require a disposition of the motion for leave on an accelerated basis, and (ii) no party desires a ruling from the Tribunal upon the motion for leave prior to the Status Conference with Judge Kaplan, we would be prepared to fix the deadline for Claimants' response to the motion for leave at a later time in the coming week that is agreeable to the Parties, but not later than Friday May 17.
>
> With best wishes to all.
>
> Marc J. Goldstein, for the Tribunal

2. For the reasons stated below, the Application is denied.

3. In our Second Partial Final Award in this case ("PFA-2"), issued August 22, 2022 and confirmed as a Judgment of the United States District Court for the Southern District of New York ("the Southern District Court") on February 20, 2024 (hereinafter the "PFA-2 Judgment") we granted a sanction under AAA Rule R-58 (in the 2013 Commercial Rules), providing that proceedings on Respondents' counterclaims in this action are stayed until "the Respondents shall demonstrate to the satisfaction of the Tribunal that they have complied in full with this Award, with PFA-1 (unless that Award is vacated or its recognition and enforcement is refused), and our Orders dated November 12, 2021, December 8, 2021 (including full reimbursement to Claimants of any expenditures borne by Claimants for the fees of the Company's counsel under PO 2022-08), and March 15, 2022)."

4. Thus, whether and to what extent the relief requested in the Application is permissible under the PFA-2 Judgment without the conditions for lifting the stay of counterclaims having been satisfied — that is to say, whether the application presents what are <u>in substance</u> counterclaims albeit <u>in form</u> requests for interim measures under Rule R-37 — is a question to be addressed by the Southern District Court - and by the Tribunal only to the extent directed by the Southern District Court.

5. Further, decretal paragraphs 3 and 4 of PFA-2 provided:

> 3. No application by Respondents to the Tribunal will be entertained for the removal or suspension from their Company positions of Mr. Gaitán or Ms. Echeverría based upon conduct occurring prior to July 22, 2022 (the date of the last proceeding prior to this Award). The Tribunal makes no Award with respect to the conditions that would need to be satisfied for any such application based on conduct subsequent to July 22, 2022.

Claimants responded in an email on May 13, 2024 at 10 a.m. They stated in relevant part: "Peppertree/AMLQ submit that entertaining the motion Respondents seek leave to file and engaging in substantive briefing on the issues therein is a waste of the Tribunal's time, as well as the parties' time and money."

> 4. No claim against Claimants by Respondents will be allowed based upon the Peppertree-appointed directors having failed to support the removal of Mr. Gaitán and Ms. Echeverría from their Company positions on the basis of their conduct up to July 22, 2022.

6. Based on the PFA-2 Judgment, questions as to whether and to what extent the relief requested in the Application is permitted notwithstanding the foregoing decretal paragraphs is a question that can only be answered by the Southern District Court unless the Court directs a determination by the Tribunal. This observation applies in particular, but is not necessarily limited to, the allegations in the Application that Mr. Gaitán and Ms. Echeverría entered into a non-disclosure agreement with a competitor of the Company that was also a potential purchaser of the Company, with respect to the potential sale of the Company, in November 2021.

7. Insofar as the Application seeks to direct the termination of the attorney-client relationship between the Company and its counsel in this arbitration, we understand this issue to be presented by certain Respondents, as plaintiffs in the Southern District Court in Civil Action 1:22-cv-06150 (LAK). We do not believe the Tribunal has jurisdiction to address this question unless and until (i) Respondents expressly submit this issue for arbitral determination and dismiss the aforementioned the Southern District Court action, or (ii) that action is stayed or dismissed with a referral to arbitration. Even in one of these two scenarios, the Southern District Court would also need to determine (or remand to the Tribunal to determine) whether the Respondents' pursuit of this claim is presently permitted notwithstanding the stay of counterclaims in the PFA-2 Judgment.

8. The Application is not adequately specific about why the specified relief under Rule R-37 is sought with respect to Mr. Gaitán's alleged uses of funds advanced by the Claimants on behalf of the Company. Insofar as it alleged that Claimants knowingly advanced sums to be used for purposes other than those for which they are asserting damages claims in Phase 2, Respondents are not prevented for presenting their evidence in defense against Claimants' claims. Further, the Application makes vague innuendos that funds were misapplied to pay for investigations into the assets of Respondent Hernandez. But for this to be a viable basis for interim relief, Mr. Hernandez or one or more other Respondents would have to show irreparable harm, and some relationship to the merits of a claim (assuming the claim could be asserted notwithstanding the counterclaims stay). Mr. Hernandez is a judgment debtor of costs awards in this arbitration that have been

confirmed by the Southern District Court. Unless those money judgments have been satisfied, we fail to see in the Application how Respondents propose to show that such an investigation of Mr. Hernandez's assets in the name of the Company, by or through the Company's CEO and/or its counsel, is relevant at this juncture of the proceedings.

9. We make the following additional observations concerning the role of Submissions Counsel in preparing the Application, and we do this in the interest of the integrity of the arbitration albeit these remarks are not necessary to –but they do reinforce -- our ruling that the Application should be denied.

10. The Application purports to be based on "unsolicited information" delivered to Hugo Ortiz, who is said be the "legal representative" of the Company's subsidiaries in Guatemala. The Application states that this unsolicited information "***demonstrates beyond any doubt*** that Jorge Gaitán and Carol Echeverría have been actively working against the interests of the company for several years." (emphasis supplied).

11. But Mr. Ortiz has not provided a verification of the Application, and Mr. Ortiz does not present an affidavit attesting to the facts stated in the Application. The (indirectly) attesting witness is one of the Respondents, a member of the Board of the Company at the time of Claimants' most recent (October 2023) amended pleading, Alejandro Sagustume. And Mr. Sagustume's affidavit dated May 9, 2024, the day before the Application, is not originally submitted by Mr. Sagastume in this arbitration. It was prepared for and submitted in the action brought in the Eastern Caribbean Supreme Court in the British Virgin Islands, an action that was enjoined by the Southern District Court. (We assume but do not know that Submissions Counsel has played no counsel role in the BVI Action and therefore had no involvement in preparing the Sagastume Affidavit). The stated purpose of Mr. Sagastume's affidavit, in the context of an application for cost-shifting, was to demonstrate to the BVI Court that the decision of Claimant in that action to discontinue the action -- the Company's Chief Financial Officer Juan Francisco Quisquinay (an employee of Respondent DTH designated as Company CFO by Respondents) – was allegedly the result at least in part of coercion and threats by Mr. Gaitán and not entirely because discontinuance had been ordered by the Southern District Court.

12. This confusing labyrinth of evidence – one of Respondents' agents, Mr. Sagastume, giving written evidence in a foreign court about the motivations of another of Respondents' agents, Mr. Quisquinay, and supporting that written evidence by reference to facts and documents allegedly gathered from a stranger to the proceedings by yet another of Respondents' agents, Mr. Ortiz – a veritable telenovela - would seem to us to have invited some level of inquiry by Submissions Counsel before sending this Tribunal the May 9 Sagastume affidavit in the BVI Action only 24 hours later, on a Saturday afternoon, in support of an application for "emergency relief" from this Tribunal.

13. PFA-2, now incorporated into the PFA-2 Judgment, provides that Respondents' Submissions Counsel, by making a written submission to the Tribunal, "will be deemed to represent to the tribunal, upon penalty of disqualification from further appearance in this arbitration in case of violation, the matters that are considered to be associated with an attorney's signature in a submission to a court of the United States under Rule 11 (b) of the Federal Rules of Civil Procedure."

14. It is to be understood by the Tribunal, therefore, that Respondents' Submissions Counsel certifies to the Tribunal, upon penalty of disqualification, that "to the best of [his] knowledge, information, and belief, formed after an inquiry reasonable under the circumstances… [that] the factual contentions have evidentiary support or, if specifically so identified will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." (Rule 11(b), FRCP).

15. Were this Application to be something the Tribunal could consider, which as indicated it cannot, the Application leaves the Tribunal with uncertainty about the scope of inquiry, if any, conducted by Submissions Counsel with respect to the reliability of what the Application calls "unsolicited information" that "***demonstrates beyond any doubt*** that Jorge Gaitán and Carol Echeverría have been actively working against the interests of the company for several years." (emphasis supplied).

16. With respect to what level of inquiry by Submissions Counsel might be "reasonable under the circumstances," three matters stand out:

(1) Mr. Sagastume in his affidavit refers to communications that are not between him and the third party alleged to be Mr. Gaitán's wife and adversary in a pending divorce case in Guatemala, but rather between that person and Hugo Ortiz. Mr. Ortiz is the individual Claimant in the Guatemala arbitration that is the subject of a mandatory injunction directing termination of that arbitration (and another commenced in Peru at about the same time). The mandatory injunction was issued by the Tribunal in its Third Partial Final Award on February 22, 2023 ("PFA-3") and was confirmed by the Southern District Court on September 6, 2023 (the "PFA-3 Injunction Judgment");

(2) Based on the Parties' reports to the Tribunal, we understand that the PFA-3 Injunction Judgment has not been complied with; instead the Guatemala arbitration is continuing to be prosecuted by Mr. Ortiz as a Claimant[3]; and

(3) Mr. Ortiz is, as recorded in PFA-3 at para. 57, one of "the Manager Claimants [who was] in the forefront of Respondents' failed effort, before the Company's Board and in turn before the Tribunal, to justify disobedience to our Interim Relief Orders on the basis that Mr. Gaitán's alleged misconduct was a compliance risk to the Company."

17. Without any acknowledgment in the Application of these circumstances, we question – but certainly do not decide at this juncture -- whether Submissions Counsel has conducted the required reasonable inquiry to satisfy himself of the reliability of the facts presented by Mr. Sagastume in his May 9 BVI Action affidavit, or of the facts indicated in the documents contained in the portfolio

[3] Also based on the Parties' reports, we understand that there are at least four similar foreign arbitrations that are ongoing. The one in Peru was the subject of PFA-3 as well. The ones filed in El Salvador and Honduras were reported to us later. We have not seen the pleadings in the later cases, but the record in this case establishes that Mr. Ortiz is a Company Manager of the Honduras subsidiary, and we presume he is a Claimant in the Honduras arbitration. PFA-3, and in turn the PFA-3 Judgment, anticipating such additional foreign arbitrations, enjoined Respondents to prevent them from being filed, and if they were filed to cause them to be terminated.

of exhibits to that affidavit – a portfolio whose existence and provenance is within the personal knowledge of Mr. Ortiz, not Mr. Sagastume.

18. We are troubled, in the context of this arbitration, and Mr. Ortiz's prior roles in relation to it, by the appearance that Submissions Counsel in a May 10 Application relied entirely upon the premise that the facts, circumstance and allegations contained in Mr. Sagastume's May 9 BVI Affidavit were trustworthy and that no meaningful investigation was warranted before the filing of the Application.

19. Our concern about the potential inadequacy of any investigation undertaken by Submissions Counsel is reinforced by the representation provided to the Tribunal on May 12 by the Company's counsel that Submissions Counsel made no attempt to discuss, much less verify, with the Company's counsel the allegations of misconduct the Application asserts against that counsel. This is an arbitration that has been uniquely influenced in its course by what the Tribunal has found to have been contrivances of false evidence by the Respondents, collaboration by many of Respondents' co-counsel either in the creation of false or improper evidence or in its presentation to the Tribunal, and unjustified refusals by Respondents to provide evidence the Tribunal ordered them to produce. This is why the Submissions Counsel sanction was imposed.[4] The scandalous, salacious and otherwise dramatic content of certain of the communications, as quoted by Mr. Sagastume in his May 9 BVI affidavit, and the fact that the affiant is Mr. Sagastume and not Mr. Ortiz, raise additional questions that ought to have warranted inquiry by Submissions Counsel before passing along the entire BVI Affidavit file to the Tribunal on the very next day after it was filed in the BVI, on Saturday May 10, in what is styled as an emergency application.

20. We reach no judgment at this time as to whether there has been a violation by Submissions Counsel of its obligations under the PFA-2 Judgment such as would require disqualification. But

[4] Respondents sought to file the exhibits portfolio of Mr. Sagastume's BVI May 9 affidavit with our Tribunal in conjunction with the Application. We declined to receive it, on the basis that such evidence exceeds the scope of an application for leave in the circumstances. But we do not think a closer inspection of it would satisfy the Tribunal that Submissions Counsel could place reliance on those exhibits without inquiry directly to the person or persons who provided them to Respondents.

if this Application is renewed (insofar as the Southern District Court determines that it may be presented), that issue may be raised by the Tribunal *sua sponte*, and we would be guided — both as to the potential granting of leave and as to the disqualification issue, by the reasonableness of the inquiry described by Submissions Counsel in the circumstances of this arbitration.

21. The Application is denied.

It is SO ORDERED this 13th day of May 2024

Marc J. Goldstein, for the Tribunal